

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF PUERTO RICO

3                   GEORGE MAKRIS, et al.,

4                   Plaintiffs,

5                   v.

CIVIL NO. 08-1718 (RLA)

6                   SPENSIERI PAINTING, LLC.,  
7                   et al.,

8                   Defendants.

9

10                  ORDER DENYING MOTION TO DISMISS  
11                  FILED BY CORNELL UNIVERSITY AND NAIC  
12                  STAYING CONTROVERSY REGARDING DBA EMPLOYER IMMUNITY  
13                  SETTING DEADLINE FOR FILING JOINT STATUS REPORT

14                  Codefendants CORNELL UNIVERSITY and its NATIONAL ASTRONOMY AND  
15                  IONOSPHERE CENTER ("NAIC") (collectively identified as "CORNELL")  
16                  have moved the court to dismiss the instant proceedings pursuant to  
17                  the provisions of Rules 12(b)(1) and (b)(6) Fed. R. Civ. P. In  
18                  support of their request, movants argue that exclusive jurisdiction  
19                  over the claims asserted against them lies with the Defense Base Act,  
20                  42 U.S.C. § 1651 et seq. ("DBA"). Petitioners further contend that  
21                  plaintiffs are covered employees under the DBA and CORNELL having  
22                  provided benefits for their work-related injuries, is entitled to  
23                  immunity from tort liability in these proceedings.

24                  Both plaintiffs and defendant SPENSIERI PAINTING, LLC  
25                  ("SPENSIERI") have opposed the aforementioned request alleging *inter*  
26                  *alios* that: the DBA is inapposite to the facts of this case because  
                the labor performed did not involve public work; movant's request for

1 CIVIL NO. 08-1718 (RLA)

2 **Page 2**

---

3 dismissal should be denied because it improperly relies on material  
4 outside the complaint and, in the alternative, that they should be  
5 allowed an opportunity to conduct discovery prior to the court ruling  
6 on the motion.

7 **PROCEDURAL BACKGROUND**

8 Plaintiffs, GEORGE MAKRIS, JOHN SIMIONE-FILARETOU and CESAR  
9 GUEVARA, instituted the instant proceedings against CORNELL and  
10 SPENSIERI seeking relief under art. 1802 of the Puerto Rico Civil  
11 Code, P.R. Laws Ann. tit. 31, § 5141 (1990), our local tort  
12 provision, for damages allegedly sustained during a work-related  
13 accident which occurred on July 8, 2007, at the Arecibo Observatory,  
14 in Arecibo, Puerto Rico.

15 Subsequently, SPENSIERI impleaded TSA CONSTRUCTION, INC. and  
16 DIMITROS TSALICKIS as third-party defendants.

17 **RULE 12(b) (1) AND 12(b) (6) STANDARD**

18 In addition to their arguments addressing the merits of  
19 CORNELL's motion, plaintiffs and codefendant SPENSIERI have objected  
20 to CORNELL's request arguing that petitioner improperly submitted  
21 extra-pleading material for the court's consideration in support of  
22 its motion to dismiss.

23 The proper vehicle for challenging a court's subject-matter  
24 jurisdiction is not Rule 12(b) (6) Fed. R. Civ. P., but rather  
25 Rule 12(b) (1). "[T]here are distinctions that should be observed

1 CIVIL NO. 08-1718 (RLA)

2 Page 3

3 between failure to state a claim and lack of jurisdiction." Alberto  
4 San, Inc. v. Consejo de Titulares, 522 F.3d 1, 3 (1<sup>st</sup> Cir. 2008).

5 In disposing of motions to dismiss for failure to state a claim  
6 pursuant to Rule 12(b)(6), the court will accept all factual  
7 allegations as true and will make all reasonable inferences in  
8 plaintiff's favor. Frazier v. Fairhaven School Com., 276 F.3d 52, 56  
9 (1<sup>st</sup> Cir. 2002); Alternative Energy, Inc. v. St. Paul Fire and Marine  
10 Ins. Co., 267 F.3d 30, 33 (1<sup>st</sup> Cir. 2001); Berezin v. Regency Sav.  
11 Bank, 234 F.3d 68, 70 (1<sup>st</sup> Cir. 2000); Tompkins v. United Healthcare  
12 of New England, Inc., 203 F.3d 90, 92 (1<sup>st</sup> Cir. 2000).

13 Our scope of review under this provision is a narrow one.  
14 Dismissal will only be granted if after having taken all well-pleaded  
15 allegations in the complaint as true, the court finds that plaintiff  
16 is not entitled to relief under any theory. Brown v. Hot, Sexy and  
17 Safer Prods., Inc., 68 F.3d 525, 530 (1<sup>st</sup> Cir. 1995) cert. denied 116  
18 S.Ct. 1044 (1996); Vartanian v. Monsanto Co., 14 F.3d 697, 700 (1<sup>st</sup>  
19 Cir. 1994). Our role is to examine the complaint and to determine  
20 whether plaintiff has adduced sufficient facts to state a cognizable  
21 cause of action. Alternative Energy, 267 F.3d at 36. The complaint  
22 will be dismissed if the court finds that under the facts as pleaded  
23 plaintiff may not prevail on any possible theory. Berezin, 234 F.3d  
24 at 70; Tompkins, 203 F.3d at 93.

25 Further, when disposing of a motion to dismiss under Rule  
26 12(b)(6), the court may look at matters outside the pleadings under

1 CIVIL NO. 08-1718 (RLA)

Page 4

2 limited circumstances such as where "a complaint's factual  
3 allegations are expressly linked to - and admittedly dependent upon -  
4 a document (the authenticity of which is not challenged), that  
5 document effectively merges into the pleadings and the trial court  
6 can review it in deciding a motion to dismiss under Rule 12(b)(6)."  
7 Perry v. New England Bus. Serv., Inc., 347 F.3d 343, 345 n.2 (1<sup>st</sup> Cir.  
8 2003) (citing Beddall v. State St. Bank and Trust Co., 137 F.3d 12,  
9 17 (1<sup>st</sup> Cir. 1998)). It may consider those facts which have been  
10 "fairly incorporated within [the complaint] and matters susceptible  
11 to judicial notice" without converting the request into a summary  
12 judgment petition. In re Colonial Mortgage, 324 F.3d 12, 15 (1<sup>st</sup> Cir.  
13 2003).

14 On the other hand, when ruling on motions to dismiss for lack of  
15 subject matter jurisdiction, the court is not constrained to the  
16 allegations in the pleadings as with Rule 12(b)(6) petitions. The  
17 plaintiff's jurisdictional allegations are given no presumptive  
18 weight and the court is required to address the merits of the  
19 jurisdictional claim by resolving the factual disputes between the  
20 parties.

21 Consonant therewith, the court may review extra-pleading  
22 material without transforming the petition into a summary judgment  
23 vehicle. Gonzalez v. United States, 284 F.3d 281, 288 (1<sup>st</sup> Cir. 2002);  
24 Aversa v. United States, 99 F.3d 1200, 1210 (1<sup>st</sup> Cir. 1996). "[T]here  
25 are times when a court should take into account documents beyond the  
26

1 CIVIL NO. 08-1718 (RLA)

Page 5

2 complaint in evaluating whether a Fed. R. Civ. P. 12 motion should be  
3 granted. One such situation occurs when there is some doubt about the  
4 court's subject matter jurisdiction." Coyne v. Cronin, 386 F.3d 280,  
5 286 (1<sup>st</sup> Cir. 2004) (internal citations omitted).

6 Even though the court is not circumscribed to the allegations in  
7 the complaint when deciding a jurisdictional issue brought pursuant  
8 to Rule 12(b) (1) and that it may also take into consideration "extra-  
9 pleading material", 5A Charles Allan Wright & Arthur R. Miller,  
10 Federal Practice and Procedure § 1350 (2d ed. 1990) p. 213, "[w]here  
11 movant has challenged the factual allegations of the party invoking  
12 the district court's jurisdiction, the invoking party 'must submit  
13 affidavits and other relevant evidence to resolve the factual dispute  
14 regarding jurisdiction.'" Johnson v. United States, 47 F.Supp.2d  
15 1075, 1077 (S.D.Ind. 1999) (citing Kontos v. United States Dept. of  
16 Labor, 826 F.2d 573, 576 (7<sup>th</sup> Cir. 1987)).

17 In ruling on a motion to dismiss for lack of subject  
18 matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the  
19 district court must construe the complaint liberally,  
20 treating all well-pleaded facts as true and indulging all  
21 reasonable inferences in favor of the plaintiff. In  
22 addition, the court may consider whatever evidence has been  
23 submitted, such as the depositions and exhibits submitted  
24 in the case.

1 CIVIL NO. 08-1718 (RLA)

2 Page 6

---

3 Aversa v. United States, 99 F.3d at 1210-11 (citations omitted). See  
4 also, Shrieve v. United States, 16 F.Supp.2d 853, 855 (N.D. Ohio  
5 1998) ("In ruling on such a motion, the district court may resolve  
6 factual issues when necessary to resolve its jurisdiction.")

7 Federal courts are courts of limited jurisdiction and hence,  
8 have the duty to examine their own authority to preside over the  
9 cases assigned. "It is black-letter law that a federal court has an  
10 obligation to inquire *sua sponte* into its own subject matter  
11 jurisdiction." McCulloch v. Velez, 364 F.3d 1, 5 (1<sup>st</sup> Cir. 2004). See  
12 also, Bonas v. Town of N. Smithfield, 265 F.3d 69, 73 (1<sup>st</sup> Cir. 2001)  
13 ("Federal courts are courts of limited jurisdiction, and therefore  
14 must be certain that they have explicit authority to decide a case");  
15 Am. Fiber & Finishing, Inc. v. Tyco Healthcare Gp. LP, 362 F.3d 136,  
16 138 (1<sup>st</sup> Cir. 2004) ("[i]n the absence of jurisdiction, a court is  
17 powerless to act.").

18 If jurisdiction is questioned, the party asserting it has the  
19 burden of proving a right to litigate in this forum. McCulloch v.  
20 Velez, 364 F.3d at 6. "Once challenged, the party invoking diversity  
21 jurisdiction must prove [it] by a preponderance of the evidence."  
22 Garcia Perez v. Santaella, 364 F.3d 348, 350 (1<sup>st</sup> Cir. 2004). See  
23 also, Manqual v. Rotger-Sabat, 317 F.3d 45, 56 (1<sup>st</sup> Cir. 2003) (party  
24 invoking federal jurisdiction has burden of establishing it).

25 Based on the foregoing, it appearing that CORNELL has put at  
26 issue our jurisdiction to entertain DBA coverage in this case, we may

1 CIVIL NO. 08-1718 (RLA)

2 Page 7

3 take into consideration the extra pleading material currently before  
4 us in ruling on its request for dismissal under Rule 12(b)(1).<sup>1</sup>

5 **FACTUAL BACKGROUND**

6 Plaintiffs were employed by codefendant SPENSIERI to carry out  
7 a sandblasting and painting job at the Arecibo Observatory pursuant  
8 to SPENSIERI's contract with CORNELL.<sup>2</sup> On July 8, 2007, while  
9 plaintiffs were applying a coat of paint to part of the radio  
10 telescope atop a two-point adjustable suspension scaffold suspended  
11 approximately 35 feet above the surface of the telescope platform,  
12 the cable snapped, causing them to fall and sustain severe injuries.

13 CORNELL had previously entered into a Cooperative Agreement for  
14 the Management and Operations of the National Astrology and  
15 Ionosphere Center with the NATIONAL SCIENCE FOUNDATION ("NSF"), a  
16 federal agency of the United States.<sup>3</sup> In pertinent part, the Program  
17 Description of the Cooperative Agreement reads as follows:

18 The National Astronomy and Ionosphere Center (the Center or  
19 NAIC), is a Federally Funded Research and Development  
20 Center (FFRDC) operated by Cornell University - Endowed,  
21 through Cooperative Agreement with the National Science  
22 Foundation. The Center consists of staff employed by

---

23 <sup>1</sup> Plaintiffs' assertion of diversity jurisdiction stands  
24 undisputed.

25 <sup>2</sup> See Arecibo Observatory Telescope Painting Project, Contract  
No. C062787 dated November 21, 2006 (docket No. 14-3).

26 <sup>3</sup> Docket No. 14-6.

1 CIVIL NO. 08-1718 (RLA)

2 Page 8

3 Cornell University and Government-owned facilities  
4 established for the conduct of research in radio and radar  
5 astronomy and space and atmospheric sciences and to support  
6 and stimulate research by the U.S. and international  
7 research community in these fields. The principal research  
8 facilities are located in Arecibo, Puerto Rico.

9 Docket No. 14-9 p.5.

10 Pursuant to this agreement, NAIC was created as a national  
11 research center to be operated by CORNELL. *Inter alios*, NAIC operates  
12 the Arecibo Observatory, the world's largest single-dish radio  
13 telescope. See <http://www.naic.edu>.

14 Even though SPENSIERI's insurer had issued a Certificate of  
15 Liability Insurance for workers' compensation in connection with the  
16 CORNELL contract on January 17, 2007,<sup>4</sup> it subsequently declined  
17 coverage for the accident at issue based on geographical reasons. In  
18 this regard, in a letter from the broker dated September 12, 2007,  
19 CORNELL's counsel was advised as follows:

20 The policy issued for Spensieri Painting LLC through  
21 Commerce & Industry Insurance (AIG) covers the insured's  
22 employees for work in New York, Florida, Virginia and  
23 Georgia. **Puerto Rico is outside the policies covered**  
24 **territories.**

25 \_\_\_\_\_  
26 <sup>4</sup> See Certificate of Liability Insurance (docket No. 14-9).

1 CIVIL NO. 08-1718 (RLA)

2 Page 9

3 Letter addressed to CORNELL subscribed by KRISTEN JULIANA-HEYDENS  
4 (docket No. 14-9) (emphasis ours).

5 Thereafter, on September 28, 2007, THE INSURANCE COMPANY OF  
6 STATE OF PA issued SPENSIERI the pertinent Certificate for workers'  
7 compensation covering labor carried out under the contract with  
8 CORNELL and making specific reference to Defense Base Act coverage.<sup>5</sup>

9 At the time of the accident at issue in this litigation CORNELL  
10 did have in place DBA insurance coverage through ACE USA.<sup>6</sup>

11 **DEFENSE BASE ACT**

12 The Defense Base Act, 42 U.S.C. § 1651 et seq., extends coverage  
13 of the provisions of the Longshore and Harbor Workers' Compensation  
14 Act, 33 U.S.C. § 901 et seq. ("LHWCA") to employees engaged in  
15 public work overseas for a company under contract or subcontract with  
16 the United States Government, a department or agency thereof. 42  
17 U.S.C. § 1651(a). In essence, the statute mandates that United States  
18 contractors and subcontractors procure workers' compensation for  
19 their employees.

20 "The DBA is a federal workers' compensation statute that  
21 incorporates the provisions of the Longshore and Harbor Workers'  
22 Compensation Act". Colon v. United States, 223 F.Supp.2d 368, 370

---

23 <sup>5</sup> Certificate of Liability of Insurance (docket No. 14-9).

24 <sup>6</sup> See Renewal Certificate for Policy No. HOTD36900040 issued by  
25 ACE AMERICAN INSURANCE COMPANY ("ACE") in effect from October 15, 2006  
26 to October 15, 2007 (docket No. 14-10).

1 CIVIL NO. 08-1718 (RLA)

Page 10

2 (D.P.R. 2002). "Congress passed the Defense Base Act in order to  
3 provide workers' compensation coverage for certain classes of  
4 employees working outside the continental United States. Rather than  
5 draft a new workers' compensation scheme, Congress used the DBA to  
6 extend the LHWCA to apply to the newly-covered workers." Kalama  
7 Serv., Inc. v. Dir., Office of Workers' Comp. Programs, 354 F.3d  
8 1085, 1090 (9<sup>th</sup> Cir. 2004) (internal citations omitted).

9 In effect since 1941, the DBA was initially meant to provide  
10 coverage protection to civilians employed in military bases during  
11 World War II. Through time its coverage has been extended to include  
12 employees working outside the continental United States who provide  
13 a myriad of contractual services. "Since enactment, the scope of the  
14 DBA has expanded to cover the wide range of contracts which private  
15 firms now undertake; these contracts include construction projects,  
16 support services, such as food, accommodations, and sanitation for  
17 troops on the battlefield, and intelligence gathering,  
18 communications, weapons maintenance, and even troop training." Greta  
19 S. Milligan, *The Defense Base Act: an Outdated Law and its Current*  
20 *Implications*, 86 U. Det. Mercy L. Rev. 407, 411 (Spring 2009)  
21 (citations and internal quotation marks omitted).

22 "The purpose of the Defense Base Act is to provide uniformity  
23 and certainty in availability of compensation for injured employees  
24 on military bases outside the United States." Davila-Perez v.  
25 Lockheed Martin Corp., 202 F.3d 464, 468 (1<sup>st</sup> Cir. 2000).

1 CIVIL NO. 08-1718 (RLA)

2 Page 11

---

3 "Puerto Rico is... covered by the Defense Base Act". Davila-  
4 Perez, 202 F.3d at 468; Colon, 223 F.Supp.2d at 370.

5 **Public Work**

6 In order to qualify for protection under the DBA, the injured or  
7 deceased worker must have been engaged in "public work" which is  
8 defined in the statute as "any fixed improvement or any project...  
9 involving construction, alteration, removal or repair for the public  
10 use of the United States... including but not limited to projects or  
11 operations under service contracts...." 42 U.S.C. § 1651(b)(1).

12 "[T]he DBA provides an employee's exclusive remedy if the  
13 employee was engaged in employment outside the United States under a  
14 contract between his employer and the United States for the purpose  
15 of engaging in public work". Fisher v. Halliburton, 390 F.Supp.2d  
16 610, 613 (S.D.Tex. 2005). "[T]o be covered, a service contract must  
17 be connected either with a construction project or with a national  
18 defense activity. Service contracts lacking a construction or  
19 national defense nexus simply fall beyond the boundaries of the DBA."  
20 Univ. of Rochester v. Hartman, 618 F.2d 170, 173 (2<sup>nd</sup> Cir. 1980). "The  
21 sine qua non of the Act's applicability has always been a military or  
22 a United States government construction connection. There is no  
23 reason to suppose that a service contract is exempt from this  
24 prerequisite nexus." Hartman, 618 F.2d at 173-74.

25

26

1 CIVIL NO. 08-1718 (RLA)

2 Page 12

3 **Exclusive Remedy**

4 The DBA specifically provides that liability under the statute  
 5 "shall be exclusive and in place of all other liability of such  
 6 employer, contractor, subcontractor, or subordinate contractor to his  
 7 employees (and their dependents) coming within the purview of this  
 8 chapter, under the workmen's compensation law of any State, Territory  
 9 or other jurisdiction irrespective of the place where the contract of  
 10 hire of any such employee may have been made or entered into."  
 11 § 1651(c). "[T]he DBA provides an employee's exclusive remedy if the  
 12 employee was engaged in employment outside the United States under a  
 13 contract between his employer and the United States for the purpose  
 14 of engaging in public work, including contracts". Fisher v.  
Halliburton, 390 F.Supp.2d at 613.

15 The immunity provided by the DBA is contingent upon the employer  
 16 obtaining insurance coverage for the injured or deceased employee.<sup>7</sup>  
 17 "[A]n employer that secures insurance coverage for its employees as  
 18 required by the DBA is entitled to immunity under the LHWCA." Colon,  
 19 223 F.Supp.2d at 370. See also, Davila-Perez, 202 F.3d at 466, where  
 20 the court found the employer immune from suit because it had

---

22 <sup>7</sup> In this regard, the LHWCA provides at § 905(a):

23 The liability of an employer prescribed in  
 24 section 904... shall be exclusive and in place of  
 25 all other liability of such employer to the  
 26 employee... except... if an employer fails to  
 secure payment of compensation as required by  
 this chapter.

1 CIVIL NO. 08-1718 (RLA)

Page 13

2 "procured workers' compensation and employers' liability insurance  
3 from CIGNA, pursuant to its contract requirements with the Navy."

4 The DBA requires that government contractors guarantee insurance  
5 coverage for their employees. In the event that a subcontractor does  
6 not comply with the insurance requirement, the contractor is then  
7 under an obligation to obtain one.

8 Every employer shall be liable for and shall secure  
9 the payment to his employees for the compensation payable  
10 under [the DBA]. In the case of an employer who is a  
11 subcontractor, only if such subcontractor fails to secure  
12 the payment of compensation shall the contractor be liable  
13 for and be required to secure the payment of compensation.

14 33 U.S.C. § 904(a).

15 Having arranged for insurance compensation due to a  
16 subcontractor's failure to do so, the contractor is then entitled to  
17 the statutory employer defense as provided in 33 U.S.C. § 905(a)  
18 which, in pertinent part reads: "a contractor shall be deemed the  
19 employer of a subcontractor's employees only if the subcontractor  
20 fails to secure the payment of compensation as required by section  
21 904". In those instances, the immunity benefits extend exclusively to  
22 the entity paying for the compensation thus leaving the subcontractor  
23 open to a suit for damages by the injured employee or his estate in  
24 case of death. See Cintron-Rodriguez v. United States, 995 F.Supp.  
25 238, 241 (D.P.R. 1998) ("Under the LHWCA, a contractor is only  
26

1 CIVIL NO. 08-1718 (RLA)

2 Page 14

---

3 considered a statutory employer exempt from suit by an injured  
4 employee if the contractor was the one who secured the payment of  
5 compensation because the subcontractor failed to do so"); Rivera-  
6 Carmona v. United States, 858 F.Supp. 295, 296 (D.P.R. 1994) ("United  
7 States is not entitled to the statutory employer immunity it asserts  
8 because the subcontractor did not fail to secure workers'  
9 compensation for plaintiff under the LHCWA").

10 CORNELL posits that we have no jurisdiction to entertain  
11 plaintiffs' tort claims against it because these are precluded by the  
12 DBA inasmuch as it had procured workers' compensation insurance for  
13 the contracted work at the Arecibo Observatory.<sup>8</sup> Even though we  
14 concede that the remedies provided by the DBA for work-related  
15 injuries are exclusive in situations where the employer has procured  
16 the pertinent insurance coverage, the courts may still examine all  
17 pertinent information to determine whether or not there is DBA  
18 coverage when disposing of an immunity defense raised by a defendant  
19 in judicial proceedings. See i.e., Davila-Perez (concluding that  
20 employer was entitled to immunity from tort claims based on the  
21 LHWCA). Hence, we reject CORNELL's lack of jurisdiction argument.

22

---

23       <sup>8</sup> SPENSIERI further challenges CORNELL's immunity claim alleging  
24 that: (1) its contract with CORNELL did not cite mandatory DBA  
25 language as required by 48 C.F.R. §§ 28.309 and 52.228-3 and (2) an  
26 issue of fact remains as to whether CORNELL secured compensation "for  
the benefit of the subcontractor [SPENSIERI]" as allowed in the LWHCA,  
33 U.S.C. § 904(a).

1 CIVIL NO. 08-1718 (RLA)

Page 15

2  
3 **PARALLEL WORKERS' COMPENSATION PROCEEDINGS**4 It is important to note, however, that proceedings seeking  
5 compensation regarding all plaintiffs to this litigation have been  
6 instituted with the UNITED STATES DEPARTMENT OF LABOR ("US-DOL")  
7 pursuant to the DBA.<sup>9</sup> Additionally, a claim for state workers'  
8 compensation benefits was filed in New York on behalf of plaintiff  
9 MAKRIS.10 To this effect, the parties have submitted the following  
11 documents evidencing administrative determinations regarding workers'  
12 compensation proceedings: (1) letter from the US-DOL dated January  
13 26, 2009 acknowledging that MAKRIS is entitled to benefits under the  
14 LHWCA,<sup>10</sup> (2) application for Board Review of the US-DOL determination  
15 dated February 26, 2009,<sup>11</sup> (3) New York Workers' Compensation  
16 Administrative Review Division decision dated February 27, 2009,  
17 concluding that DBA applies to the claims of plaintiff MAKRIS<sup>12</sup> and18  
19  
20  
21 <sup>9</sup> These administrative proceedings have been assigned the  
following numbers:22 GEORGE MAKRIS - OWCP No. 02-178184  
23 CESAR GUEVARA - OWCP No. 02-178185  
JOHN SIMIONE FILARETOU - OWCP No. 02-17818624 <sup>10</sup> Docket No. 44-3.25 <sup>11</sup> Docket No. 44-3.26 <sup>12</sup> Docket No. 46-2.

1 CIVIL NO. 08-1718 (RLA)

2 Page 16

3 (4) SPENSIERI's appeal of this determination to the Supreme Court of  
4 the State of New York.<sup>13</sup>

5 Apart from the judicial review instituted under the New York  
6 workers' compensation statute, administrative coverage determinations  
7 under the DBA are also subject to internal review processes as well  
8 as judicial scrutiny. As discussed *ante*, the DBA incorporates the  
9 provisions of the LHWCA.<sup>14</sup> In 1972, the review mechanism applicable  
10 to claims covered by the LHWCA was amended. The amended statute  
11 established a Benefits Review Board responsible for examining  
12 benefits determinations made by administrative law judges and then  
13 direct appeal to the federal appellate courts rather than to the  
14 United States district courts as previously mandated.<sup>15</sup> This new  
15 judicial review provision, however, does not mention cases covered by  
16 the DBA which has generated a controversy regarding the proper forum  
17 for seeking judicial review of the agency's determinations, i.e.,  
18 district courts versus courts of appeals. See Claire Been, *Bypassing*  
19 *Redundancy: Resolving the Jurisdictional Dilemma under the Defense*  
20 *Base Act*, 83 Wa.I.R. 219 (May, 2008). Most courts which have grappled  
21 with the issue have concluded that, because the DBA still provides

22

23

---

24 <sup>13</sup> Docket No. 46-3.

25 <sup>14</sup> See 42 U.S.C. § 1651(a).

26 <sup>15</sup> See 33 U.S.C. § 921(b) and (c).

1 CIVIL NO. 08-1718 (RLA)

2 Page 17

3 that judicial review lies with the district courts,<sup>16</sup> the LHWCA  
 4 amendment is inapposite.<sup>17</sup>

5 The review currently pending before the Supreme Court of the  
 6 State of New York - which specifically deals with DBA coverage  
 7 regarding a plaintiff herein - raises a palpable specter of  
 8 inconsistent findings between the state and federal fora should we  
 9 decide to proceed to rule on this issue. At the same time, there is  
 10 already in place a US-DOL determination regarding coverage currently  
 11 subject to an administrative review. Our delving into the coverage  
 12 controversy at this time would undoubtedly interfere with the  
 13 comprehensive review scheme provided for in the DBA.<sup>18</sup>

14 Faced with this procedural scenario, we find it best to deny  
 15 CORNELL's petition for dismissal on immunity grounds at this time in  
 16 order to allow all parallel determinations to come to an end rather  
 17 than venturing on the same path as other administrative and/or  
 18 judicial entities thereby duplicating the proceedings and running the  
 19 risk of reaching inconsistent results.

---

20  
 21<sup>16</sup> See 42 U.S.C. § 1653(b).

22<sup>17</sup> See ITT Base Serv. v. Hickson, 155 F.3d 1272, 1275 (11<sup>th</sup> Cir.  
 23 1998); Lee v. Boeing Co., 123 F.3d 801, 805 (4<sup>th</sup> Cir. 1997); AFIA/CIGNA  
Worldwide v. Felkner, 930 F.2d 1111, 1116 (5<sup>th</sup> Cir. 1991); Home Indem.  
Co. v. Stillwell, 597 F.2d 87, 90 (6<sup>th</sup> Cir. 1979). Contra Pearce v.  
Dir., Office of Workers' Comp. Programs, 603 F.2d 763, 770 (9<sup>th</sup> Cir.  
 24 1979).

25<sup>18</sup> We have no information regarding the finality of the US-DOL  
 26 coverage determination.

1 CIVIL NO. 08-1718 (RLA)

Page 18

2  
3 CONCLUSION4 Based on the foregoing, the Motion to Dismiss filed by CORNELL  
5 UNIVERSITY and NAIC (docket No. **12**)<sup>19</sup> is **DENIED**.6 It is further ORDERED that the controversy regarding DBA  
7 employer immunity is hereby **STAYED** pending final resolution of all  
8 related proceedings pertaining to plaintiffs' DBA workmen's  
9 compensation coverage.10 It is further ORDERED that the parties shall file a Joint Status  
11 Report, **no later than December 15, 2009**, advising the court of the  
12 status of the US-DOL and the New York judicial proceedings regarding  
13 DBA coverage with their suggestions on how to proceed in this case.

14 IT IS SO ORDERED.

15 San Juan, Puerto Rico, this 17<sup>th</sup> day of November, 2009.16  
17 S/Raymond L. Acosta  
RAYMOND L. ACOSTA  
18 United States District Judge19 See Memorandum of Law (docket No. **13**); Affirmation of KEITH  
L. FLICKER (docket No. **14**); Affidavit of WILSON A. ARIAS (docket No.  
**15**); SPENSIERI's Opposition (docket **25**); Plaintiffs' Opposition  
(docket No. **29**); Reply (docket No. **33**); Reply Affirmation of KEITH L.  
FLICKER (docket No. **34**); SPENSIERI's Surreply (docket No. **35**); Motion  
to Supplement (docket No. **40**); Reply (docket No. **44**); Surreply (docket  
No. **45**); Second Motion to Supplement (docket No. **46**) and Plaintiffs'  
Opposition (docket No. **47**).